Supreme Court of the United States.

OCTOBER TERM, 1903.

CHARLES McINTIRE, APPELLANT AND PLAINTIFF IN ERROR,

vs.

EDWIN A. McINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE.

No. 84

BRIEF FOR ADMINISTRATOR C. T. A.

I.

APPELLANT'S FIRST, SECOND AND FIFTH ASSIGNMENTS OF ERROR.

The principal and most important question in this case arises upon the first, second and fifth assignments of error of Charles McIntire (hereinafter called the appellant), appellant and plaintiff in error in No. 84 and the defendant in error and appellee in No. 85. That question is whether, under the residuary clause of the will of his uncle, David McIntire, the *residuum* of the estate should be distributed *per capita* or *per stirpes*.

David McIntire died April 1, 1884 (R., p. 14), leaving

surviving him a brother, Charles McIntire, father of the Charles McIntire who is the party to these appeals, and five nephews and nieces, the children of a deceased brother, Edwin McIntire. He left a will dated January 7, 1880, by which, after making a bequest to each of his brother Edwin's children of $1,350.64, with interest from July 1, 1854, until testator's death, he provided that "*The remainder, if any, is to be equally divided between my brothers Edwin and Charles children.*" At the date of the will, the testator's brother Charles was, as stated, living, and had two sons, Charles and Henry. Henry died before the testator, namely, April 1, 1880, and his father, Charles, Sr. died pending proceedings which he instituted and which his son, Charles, Jr., the party to these appeals, continued as his father's administrator, seeking to revoke the probate of the will on the ground of undue influence, want of testamentary capacity, fraudulent alteration of the will, etc.

These proceedings were unsuccessful, this court in 162 U. S. 383, affirming an order of the Supreme Court of this District sustaining the probate of the will, after the trial of issues framed on the caveat of Charles, Sr. This attack on the validity of the will by father and son having failed, Charles, the son, now contends that under a proper construction of the residuary clause of the will, he is entitled to one-half of the *residuum* of the estate, instead of one-sixth. The orphans' court and the Court of Appeals have both decided the question adversely to him, the latter court resting its decision on a line of Maryland cases, establishing a rule of construction in such cases which has been followed since 1819, and which requires a distribution *per capita* and not *per stirpes* to be made when language is used in a will similar to that of the testator here, and nothing in the context of the will shows a contrary intent.

Charles, Jr., contends, first, that the face of the will itself shows a testamentary intent to separate the nieces and nephews into two classes, distinguished and identified by their respective fathers; and, secondly, that certain extraneous testimony is admissible to show, and if admitted will show, such intent. We will treat these contentions in the order stated.

Special Rule of Construction in this Case.

If David McIntire had died intestate, his estate, which consisted of personalty only, would have been distributed *per stirpes;* that is, one-half to his deceased brother Edwin's children, and one-half to his living brother Charles. For some reason, not difficult to conjecture, if it be material to know what it was, he desired to exclude his brother Charles from a participation in his estate on his death, and he therefore made a will, effectually cutting off that brother, but recognizing the moral claims of his children, Charles, Jr., and Henry, on his, the testator's bounty. Notwithstanding the fact that those children had no greater natural claims on the bounty of the testator than did the five surviving children of his deceased brother Edwin—indeed, not so much, for the latter were his legal next of kin, while the former were not—and that all of the nephews and nieces were of an equal degree of kinship to him, it is now contended that it was the intention of the testator to make an unequal distribution among his nephews and nieces, giving to two of them one-half of the estate, because of some supposed or quasi-representation by them of their living father, who had incurred the displeasure of the testator and had been ignored by him in making the final disposition of his estate. Furthermore, it should not be lost sight of that when this will was made,

Edwin's children were fatherless, while Charles' children had a living father to support and maintain them, which presumably he was doing.

If the testator's brother Charles had been dead at the time the will was made, and the testator had used the same language as he did use, namely, "*The remainder, if any, is to be equally divided between my brothers Edwin and Charles children,*" or if Charles had been living and the language had been "*The remainder to be equally divided between my brother Edwin's children and my brother Charles,*" there would have been room for argument that the meaning of the words of the will under discussion was as is now contended for by Charles, Jr., although all of the English authorities and the vast weight of American authority—as will hereinafter be shown—are against such contention; and the cases cited on behalf of the appellant would have some bearing upon the question under discussion. But as it is, the question whether the English rule of construction, as laid down in 2 Jarman on Wills (6th Am. ed., *p. 1051), that, "Where a gift is to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take *per capita* and not *per stirpes*," which the appellant contends has been repudiated by the American courts—is, we submit, one which, strictly speaking, is not involved in this case.

The fact that Charles, Sr., the brother of the testator, was *living* when the will was made, lends a significance to the words of the will and throws a light upon the intent of the testator, which renders an interpretation of the language of the will a matter of little or no difficulty.

The following cases are illustrative of the point here made:

In *Blackler* v. *Webb*, 2 P. Wms. 383, the testator be-

queathed the surplus of his personal estate equally to his son James, and to his son Peter's children, and to his daughter Traverse, and to his daughter Hannah Webb's children, and his daughter Man. At the making of the will Peter was dead, leaving several children, and Hannah Webb was living, but her husband was in low financial circumstances, and had been twice a bankrupt.

The report of the case thus states the conclusion of the court:

"Lord Chancellor at first seemed inclinable that the grandchildren should take *per stirpes* only; yet at length he decreed that the testator's son James, and the children of the testator's deceased son Peter, and his daughter Traverse, and the children of the testator's daughter Hannah Webb, and his daughter Man (being in all fourteen in number) should each of them take *per capita*, as if all the grandchildren had been named by their respective names; *and that the grandchildren could not take according to the statute, or in allusion thereto, for as much as the testator's daughter, Hannah Webb, was living, and so her children could not represent her; and to determine that the grandchildren should take per stirpes would be to go too much out of the will, and contrary to the words, when the meaning of the testator might be according to his words, and that meaning a reasonable and sensible one.*"

In *Bryant* v. *Scott*, 1 Dev. & Bat. Eq. (N. C.) 155, the bequest was of a residue of personalty—

"to be equally divided" between the following persons, viz., "Edith Bryant, Margaret Parker, Julia Vallentine, and the children of my daughter Temperance, had by John Scott, and the children of my deceased son James, and the children of my son William D. Britt."

This residue consisted entirely of personal estate, the lands having been devised in a previous clause to William

D. Britt, his son, whom he also appointed one of his executors. Chief Justice Ruffin, who delivered the opinion of the Court, said:

"Several chancellors have, in cases like this, of gifts to the testator's children and to the children of deceased children, expressed the apprehension that, in distributing *per capita*, they did not follow the intention of the testator; but they have never been able to find a ground for holding otherwise, and have thought themselves bound to that construction, although it might not be according to the intention, rather than adopt the opposite one, which obviously does violence to the words of the testator. The intention that the grandchildren should take *per stirpes*, is conjectured from the reasonableness of it, as applied to the state of most families. *But when the gift is made under circumstances which exclude all reference to the statute of distribution, that conjecture must be given up; and when to that is added a direction for an equal division among all the donees, no court could feel safe in making an unequal division.*

"The present case has both of those distinguishing circumstances. One set of the grandchildren are the children of a son of the testator, *who was then living*, and, indeed, was the executor of the will. That brings it to the very point on which the leading case on this subject, *Blackler* v. *Webb*, 2 P. Wms. 383, was decided. That was a bequest of a personal residue equally to several of the testator's children by name, and to the children of a deceased child, and the children of a living child, without any words of division. At first, Lord King inclined that the grandchildren took *per stirpes;* but, at length, he was obliged to decree otherwise, *because the mother of some of the children was living; which showed that the testator could not have looked to a legal distribution, in which grandchildren represented their deceased parents.* That case is mentioned in all the subsequent ones, and has never been questioned. The rule, indeed, is not confined to cases in which a parent of one set of the donees is alive, but extends to legacies to 'the children' of deceased parents;

as to A. and B., and the 'children' of C., deceased, and the 'children' of D., deceased, 'equally to be divided between them.' *Northey* v. *Strange*, 1 P. Wms. 340; *Butler* v. *Stratton*, 3 Bro. Ch. Ca. 367; *Lady Lincoln* v. *Pelham*, 10 Ves. 166; *Davenport* v. *Hunbury*, 3 Ves. 257."

In *Scott's Estate*, Gwynn's Appeal (1894), 163 Pa. St. 165, the will provided, as to the residue of the estate:

"Should my beloved niece die without issue, then in that case I will and devise the remainder of my estate after her decease without issue as aforesaid, to be divided among my nephews and nieces, to wit, the legal heirs of Mrs. Lillie A. Gwynn, the heirs of my beloved brother, James A. Scott, and the legal heirs of my beloved brother John W. Scott and Anna R. Stuckey (a niece), each to take share and share alike."

The niece to whom the residue of the estate was first given died without issue. It was held that the estate should be divided among the nephews and nieces mentioned in the will, *per capita* and not *per stirpes*. The testatrix left surviving her a brother, John W. Scott, and two sisters, Mrs. Gwynn and Mrs. Hutchinson. Her brother, James A. Scott, and her sister, Mrs. Barnes, died before her. All of these brothers and sisters had children, and those of John W. Scott, Mrs. Gwynn, and James A. Scott, and one of the two children of Mrs. Barnes, Anna Stuckey, were beneficiaries under the clause of the will quoted, while the children of Mrs. Hutchinson and Rush Barnes, a brother of Anna Stuckey, were not mentioned.

The court said:

"The benefit here was evidently intended for the legatees individually, as nephews and nieces, and not as representing their parents, *who*, in two instances, *are still*

living and were entirely passed over. The nephews and nieces are treated as if their parents were dead. * * * The intestate laws which would have required a distribution *per stirpes* are passed over in order to exclude brothers and sisters and give the estate directly to nephews and nieces." * * *

This case is especially significant in view of the citation by appellant in his brief of several earlier Pennsylvania cases, claimed by him to support his contention.

General Rule of Construction.

The brief filed on behalf of the appellant says (p. 17) that "whatever may be said as to the former importance of the technical rule of construction originating in *Webb* v. *Blackler*, 2 P. Wms. 383, it has been greatly shaken, if not rejected, in carefully considered cases in many of the States." The rule of construction here meant was doubtless that stated in 2 Jarman, *supra*, and adopted in *Northey* v. *Strange*, 1 P. Wms. 340, and other even earlier English decisions heretofore referred to, and not that in *Blackler* v. *Webb*, in which latter case, as the report, *supra*, shows, and as pointed out by Chief Justice Ruffin, in *Bryant* v. *Scott*, *supra*, the Lord Chancellor came to the conclusion that the distribution should be made *per capita* and not *per stirpes*, because the mother of some of the children was living, similarly as, in the case at bar, the father of two of the testator's nephews was living when the will was made. But assuming that the broad rule as laid down in Jarman is the one referred to by counsel, we think it can be demonstrated that although some of the American courts have leaned against it, the great weight of American authority is with it. Following are cases by States supporting the rule:

ALABAMA.

In Alabama, the rule of construction contended for herein, is followed. See *Howard* v. *Howard*, 30 Ala. 391.

CALIFORNIA.

In *DeLaurencel* v. *DeBoom*, 67 Cal. 362, the testator left all his property in trust to be distributed among his heirs, the children of a deceased sister, and those of a deceased brother. There survived him three children of the deceased sister and five children of the deceased brother. It was held that the children were to take the property in equal shares and not by way of representation; on the ground "that where a class is named as devisees, all of that class shall share equally."

DISTRICT OF COLUMBIA.

In *Walker* v. *Griffin*, 11 Wheat. 375 (1840), where a portion of the testator's estate was directed to be given to certain families in unequal proportions and "the balance to be given to the *families* of C. and J. T. Griffin's children in equal proportion," it was *held* that the children of the latter took *per stirpes* and not *per capita*, but Chief Justice Marshall said that had the testator intended the children to take equally, "the natural mode of expressing that intention would have been to devise the property to the *children of Cyrus and John T. Griffin. They would then have taken individually and not by families.*"

In *Moffit* v. *Varden*, Fed. 9 Cases, 689 (5 Cranch C. C., 658) the will read:

"I leave all my other property, both real and personal, to be equally divided among the children of my brother

Richard Varden, and my sister Henrietta Micknm, when they arrive at the age of maturity."

The court, Chief Justice Cranch delivering the opinion, said:

"The devise in this case being directly to the children of the testator's brother and sister, the devisees take *per capita* and not *per stirpes;* and each is entitled to an equal share."

In *Follansbee* v. *Follansbee* (1895) 7 App. D. C. 282, the bequest was after the termination of a life estate "to the children of my brothers, J. M. F. and J. V. F., and to the children of my late brother, G. F., in equal proportions, share and share alike." *The brothers, J. V. F. and J. M. F., were living at the time of the testator's death.* The court held that the distribution was to be made *per capita* and not *per stirpes.*

GEORGIA.

In *Payne* v. *Rosser*, 53 Ga. 662, the testator after creating a life estate, provided that his property was to go to and be equally divided *between* the children of Thomas and Jane M., deceased, the children of W. D. G., deceased, and the children of N. A. G., who was then living. The court held that distribution should be *per capita* and not *per stripes*, saying that:

"The devisees are all equally of kin to the testator, to wit: the children of his niece and nephews, and the gift is to them directly. * * * In 1 Roper on Legacies, it is said that the taking *per stirpes* always presupposes an irregularity of relationship. See 2 P. Wms. 383; 3 Bro. C. C. 367. The same authority, 1 Roper 157, gives great weight to the terms 'equally divided' when used in a will,

for ascertaining the intention of the testator as to whether the objects of his bounty are to receive it *per capita* or *per stirpes*. It is therein said that if the testator's next of kin are a brother and the children of a deceased brother and thus not related to him in equal degree, yet if he has shown an intention that they shall take his property in equal shares, that is *per capita*, the distribution by the statute will be superseded. This may occur when the bequest is to relations 'and next of kin,' etc., to be equally divided among them or by expressions of a like import. In the will under consideration, there was the direction for an equal division *between* certain devisees, who were equally related to the testator, and no indication that it was his intention for them to take as classes, which very probably would give to them individually unequal shares in the estate."

See also *Huggins* v. *Huggins*, 72 Ga. 825.

In *White* v. *Holland*, 92 Ga. 216, cited by counsel for the plaintiff in error, the court expressly refused to decide from the terms of the will itself whether the distribution should be *per capita* or *per stirpes*, and concluded from extraneous evidence alone, showing a marked degree of affection for one of the legatees, that the testator intended that the distribution should be *per stirpes*, and decreed accordingly. (In deciding that such evidence was admissible to show the intent of the testator, as against his words, that case is utterly at variance with the cases in this and other courts hereinafter cited on the subject.)

ILLINOIS.

The rule is also followed in Illinois. In *Pitney* v. *Brown*, 44 Ill. 363 (1867), the will provided:

"The balance remaining of said fund I hereby direct shall be equally divided *between* the children of my late brother, Mahlon Pitney, and my brother-in-law, William

H. Brown, of the city of Chicago, a large portion of my property having been received through his father and the father of my late wife, Betsy H. Pitney."

There were three children of Mahlon Pitney, and the question was whether the distribution of the residue of the fund was, as between them and Brown, to be *per stirpes* or *per capita*. The court reviewed many authorities, both English and American, and followed the rule laid down in 2 Jarman, 111, ordering the distribution to be made *per capita*.

See also *Best* v. *Farris*, 21 Ill. App. 49.

KENTUCKY.

In *Purnell* v. *Culbertson*, 12 Bush (Ky.) 369, the testator after a devise for life, provided for the distribution of his real and personal property—

"equally *between* my nephew, Julius Culbertson, of this county, Mattie Ervine, Ettene Case, and the children (two) of Thomas D. Purnell, niece and nephew of mine, and residing in and about Natchez, Miss."

The court in deciding that the distribution should be *per capita*, after quoting a number of authorities, including Jarman on Wills, said:

"It is plain the testator did not intend to follow the laws of descent and distribution in the division of his estate among these collateral kindred, nor did he intend to give to each class of children what their ancestor would have been equally entitled to had he been living, but, on the contrary, we are of the opinion that the testator intended that his entire estate at the death of his wife should go to the devisees named, to be equally divided between them *per capita*, share and share alike."

And so in *McFatridge* v. *Holtzclaw*, 94 Ky. 352, where the devise was of property to be—

"equally divided *between* the heirs of my brothers and sisters, share and share alike, as though my brothers and sisters were living,"

it was held that the children of the testator's brothers and sisters took *per capita* and not *per stirpes*, their parents being alive not only at the date of the will, but at the date of its publication. See also *Brown* v. *Brown*, 6 Bush (Ky.) 648.

MARYLAND.

Maddox v. *State*, 4 H. & J. 540, was a proceeding instituted in Maryland in 1816. The language of the will which was construed by the Court of Appeals of Maryland, which will was dated September 17, 1798, was practically identical with the language in the will of David McIntire under construction in the case at bar. The language was:

"All of the residue of my estate, after my just debts are paid, to be equally divided *between* my brother Justinian, and my brother George's children."

Justinian survived the testator, but George predeceased the testator, leaving six children, all of whom were living at the death of the testator. The judgment of the lower court was that the legatees took as tenants in common, each receiving one-seventh of the estate *per capita*, and this judgment was affirmed by the Court of Appeals. It is true that the opinion is brief, the court simply stating that it concurred with the court below in the opinions expressed in several bills of exceptions. But in the case of *Alder* v. *Beall*, 11 G. & J. 123, cited by appellant in support of his contention, no opinion at all was delivered by the court.

Alder v. *Beall* (*ubi sup.*) was the next case which arose in Maryland bearing upon this subject. It was decided in 1840. The provision of the will was:

"The residue of my estate, real and personal, to be equally divided *between* the children of my sister, Anne Latimer, *and their heirs forever*, and the children of my sister, Penelope Beall, *and their heirs forever*."

The fact that the will devised real estate as well as personalty, and that it used apt words in referring to the children of each sister, namely, "*and their heirs forever*," to vest a fee simple title in the children of each sister, and therefore indicated an intent to separate such children into classes, was urged in the argument. The Court of Appeals affirmed the decision of the orphans' court directing a distribution *per stirpes*, but without an opinion.

The next case in Maryland in point of time was that of *Brown* v. *Ramsey*, 7 Gill, 348 (1848.) There the language was:

"The residue to be equally divided and paid to the following named persons, viz: To the children of my sister, H. B., deceased (naming five of such children). To the children of my sister, R. R. (naming four of such children). To the children of my brother, E. E., deceased, (naming two of such children). To the children of my brother, J. E., deceased, Isaac, two shares, Samuel J. and the children of his daughter, S. K., deceased, namely, John and Hannah, share and share alike, with the exception of Isaac's two shares, aforementioned."

The court held that the distribution was to be made *per capita* and not *per stirpes*, and distinguished the case of *Alder* v. *Beall* (*supra*), stating that that was—

"a bequest to the children of one sister, and a bequest to the children of another sister, and one class of chil-

dren (although each of that class is to have a joint interest in so much as in bequeathed to that class) is to have no interest in the part given to the other class."

Levering v. *Levering*, 14 Md. 30 (1859), was the next case which a rose in that State. The distribution in that case was directed to be *per stirpes* and not *per capita*, but the case is readily distinguishable from the case at bar and it seems unnecessary to quote here from it.

The next two cases arising in Maryland were the cases of *McPherson* v. *Snowden*, 19 Md. 197, decided in 1862, and *Thompson* v. *Young*, 25 Md. 450, decided in 1866, in both of which the distribution was ordered to be made *per capita* and not *per stirpes*. The language of the wills, however, differed to such an extent from the language of the will under consideration, that it is deemed unnecessary to quote from the cases. In both of them, however, *Levering* v. *Levering* is distinguished.

In 1876 the case of *Brittain* v. *Carson* (46 Md. 186) was decided. The language of the bequests was that the residue—

"Shall be equally divided *between* my said daughter, A. J. B., and the children of V. C."

The testator left surviving him his daughter, A. J. B., and two grandchildren, the children of his deceased daughter, V. C. There was nothing in any other part of the will to show an intention on the part of the testator that his grandchildren were to be regarded in the distribution of the residue of his estate as a class, taking by representation. The court in the opinion referred to a number of English cases, one of them being that of *Lenden* v. *Lenden*, 10 Simons, 626, where the testatrix directed the residue of her property "to be equally divided" between S. and

M., daughters of her sister, E. S., and E., daughter of her sister, S. M., and her children; and then proceeded:

"In this State the rule of construction is also well settled. In the case of *Maddox* v. *the State*, 4 H. & J., 539, where the testator directed the residue of his estate to be equally divided between his brother Justinian and his brother George's children, the court held that they took as tenants in common and that the distribution was to be made *per capita* and not *per stirpes*. The language of this will is most strikingly similar to that in the will before us, and it might have been sufficient to have referred to that case as deciding the question involved in this. This case has been followed and adopted by the subsequent decisions in this State. *Brown* v. *Ramsey*, 7 G., 347; *Thompson* v. *Young*, 25 Md. 461; *Benson* v. *Wright*, 4 Md. Ch. 278. The cases of *Alder* v. *Beall*, 11 G. & J. 123, and *Levering* v. *Levering*, 14 Md. 38, where the distribution was directed to be made *per stirpes*, are manifestly, as will be found in other similar decisions, cases in which it was apparent from the will itself, that the testator so intended the distribution to be made. They are, in this respect, readily distinguishable from the present one."

Chief Justice Alvey, who sat with the court below in the determination of the case at bar, sat with the Court of Appeals of Maryland in the case of *Brittain* v. *Carson*.

Allen v. *Keplinger* (1884), 62 Md. 8, required a *per capita* distribution to be made, largely upon the authority of the cases heretofore referred to. The language of the will is set out on page 15 of appellant's brief.

The next case was that of *Plummer* v. *Plummer*, 94 Md. 66 (1902). The language of the will is given on page 16 of appellant's brief, as also an extract from the opinion of the court. From the extract given, it will be seen that the Court of Appeals of Maryland did not overlook *Maddox* v. *The State*, *Brown* v. *Ramsey*, *Thompson*

v. *Young*, and *Brittain* v. *Carson*, *supra*, but recognised them as correct, and distinguished the case under consideration from them. Attention is also invited to the fact that in *Plummer* v. *Plummer*, as in *Alder* v. *Beall*, the will dealt with real estate and not with personalty only.

MASSACHUSETTS.

In *Hill* v. *Bowers* (1876), 120 Mass. 135, a testator left the residue of his property—

"To the children of my brother A., by his present wife, and the survivors of them, and to the children of my nephew B., and the survivors of them, their heirs and assigns forever."

At the death of the testator, A. had eight children and B. had two. It was held that the children of A. and of B .took *per capita* and not *per stirpes*, Chief Justice Gray, who delivered the opinion of the court, saying:

"The general rule is that by a bequest to the children of A. and to the children of B., the children take *per capita* and not *per stirpes*, in the absence of words indicating a different intention. There are no such words in this will. The repetition of the words, 'and the survivors of them,' only makes clear the intention of the testator not to include any children, of either person named, who did not survive the testator. Upon his death, the children who should take were ascertained, and the residue of the estate was to be equally divided among them. *Blackler* v. *Webb*, 2 P. Wms. 383; *Butler* v. *Stratton*, 3 Bro. Ch. 367; *Lincoln* v. *Pelham*, 10 Ves. 166, 176; *Heron* v. *Stokes*, 2 Dru. and War. 89; S. C. 1 Con. and Laws. 270; 4 Irish Eq. 284; *Collins* v. *Hoxie*, 9 Paige, 81; *Weston* v. *Foster*, 7 Met. 297; *Balcom* v. *Haynes*, 14 Allen, 204."

MISSISSIPPI.

In *Nichols* v. *Denny*, 37 Miss. 59, the language of the will was:

"The balance to be equally divided *between* my nephews and nieces."

The court said in the absence of any indication to the contrary on the face of the will, the rule is that:

"Where a gift is to the children of several persons, whether it be to the children of A. and B. or to the children of A. and to the children of B., they take *per capita* and not *per stirpes*." 2 Jarman on Wills, *Wel.* v. *Bradley* 2 Vt. 705; *Lugar* v. *Harman*, 1 Cox R. 250; 10 Ves. Jr. 166, 8 Ves. Jr. 604, 1 Bev. 607; *ex-parte Leith*, 1 Hill Ch. 153.

Crawford v. *Redus*, 54 Miss. 700, was a case more in point. There the language of the will was:

"The remainder of my estate I desire shall be equally divided *between* my sons and daughters now living, and my grandchildren, Lucy and Mollie, daughters of my son A. T. Redus, deceased, and Mary Martha Talliaferro and Thomas Burnet, children of my daughter Silbrino Coats, deceased."

The court said:

"It is well settled in this State and elsewhere, that this language, in the absence of other provisions showing a contrary intention, imports the taking of a equal share by each of the legatees; or, in other words, that they take *per capita* and not *per stirpes*. *Nichols* v. *Denny*, 73 Miss. 59, 2 Jar. on Wills, 111, 2 Williams on Exer's (Perkins Ed.) 1623, note *q* and authorities there cited."

NEW HAMPSHIRE.

In *Farmer* v. *Kimball* (1866), 46 N. H. 435, the residuary devise was to the testatrix's cousins and to the children of her mother's cousins—

"to be equally divided *between* them."

The court held that the distribution should be *per capita*, citing 2 Jarman, 111, and a large number of English and American cases, including *Walker* v. *Griffin*, 11 Wheat. 374. The court said:

"This construction is not controlled by the use of the word 'between.' *Abrey* v. *Newman*, 17 L. & Eq. 126; *Lenden* v. *Blackmeer*, 10 Simons, 626; *Warrington* v. *Warrington*, 2 Hare, 54; *Williams* v. *Yates*, 1 C. P. Cooper 177."

And, in conclusion:

"Upon the whole we think that any inference of an intention to divide the residue by classes is merely conjectural and quite too uncertain to prevent the application of the well settled general rule. *Lincoln* v. *Pelham*, 10 Ves. 176; *Kean* v. *Roe*, 2 Harrington, 120."

This decision was followed in *Campbell* v. *Clark* (1887), 64 N. H. 328, where a devise was "In equal shares to my nieces and nephews and to the nieces and nephews of my former husband." The court held that the distributon should be *per capita*, the court saying:

"There is nothing to indicate that the testatrix intended that those who were her nieces and nephews and also the nieces and nephews of her former husband, should take more than others."

NEW JERSEY.

In *Burnet* v. *Burnet*, 30 N. J. Eq., the will provided that the residue of the estate should be divided—

"*between* the children of Joseph H. Burnet and Benjamin F. Howell."

At the date of the will and also at the date of the testator's death, Joseph H. Burnet had four children and Benjamin F. Howell was living. There were, therefore, five residuary legatees. The court held that they took *per capita* and not *per stirpes*, saying:

"The established rule is that where a bequest or devise is made to a certain person and the children of a certain other person, the donees take *per capita* and not *per stirpes*, or, as a class, each taking an equal share. *Smith* v. *Curtis*, 5 Dutch, 345; *Fisher* v. *Skillman*, 3 C. E. Green, 229; *Pitney* v. *Brown*, 44 Ill. 363; *Blackler* v. *Webb*, 2 P. Wms. 383; 2 Jarman, 111, Hawks. on Wills, 113. This construction will yield where it appears, even faintly, from any other part of the will that the testator intended a different method of division should be adopted. This will affords no glimpse of such an intention and the division must, therefore, be by equal shares."

See also *Benedict* v. *Ball*, 38 N. J. Eq. 48; *Macknet* v. *Macknet*, 24 N. J. Eq. 277; *Thornton* v. *Roberts*, 30 N. J. Eq. 473; *Hayes* v. *King*, 37 N. J. Eq. 1; *Budd* v. *Haines*, 52 N. J. Eq. 488; *Stokes* v. *Tilly*, 1 Stockt, 120; *Fisher* v. *Skillman's Ex'rs*, 3 C. E. Green, 229.

NEW YORK.

In *Bunner* v. *Storm*, 1 Sandf. Ch. (N. Y.) 357, the testator directed that one-seventh of the estate should be equally divided among his three daughters, naming them, and the heirs of his deceased daughter Hester,

namely, T. S. B., and C. F. B., and that the furniture, etc., left to his wife, should, after her decease, be equally divided among his last named three daughters and the heirs of his said daughter, deceased. It was *held* (1) that the language of the will being plain and not ambiguous, using no doubtful terms or designation of objects requiring explanation to make them intelligible, extraneous evidence, although it was offered in the testator's own writing, was inadmissible to show that he intended to give to the two heirs of Hester together only one-fourth of the foregoing devise and bequest; and (2) that each of the heirs of Hester, as well as each of the surviving daughters, took one-fifth of the gift, and that the same was divisible *per capita* and not *per stirpes*. Many cases are cited in support of the Vice-chancellor's conclusion, among them being *Warrington* v. *Warrington*, 2 Hares' Report, 54, where the word '*between*' was used as referring to several.

In *Collins* v. *Hoxie*, 9 Paige (N. Y.), 81, the testator provided that his residuary estate should "be divided equally among the children of my sister Mary, my brother Solomon, and my brother John." The Chancellor, after saying that there might perhaps be some doubt whether the testator by this language intended the children of each should take an equal share of the residuary property, or that each of the children of the three should share equally among themselves, said:

"The settled rule of construction in such cases, however, seems to be that all the legatees take *per capita* unless there is something in the will itself indicating a different intention on the part of the testator. Thus, in *Blackler* v. *Webb*, 2 P. Wms. Rep. 383, where the testator, having had five children, one of whom had died leaving children, devised his residuary estate to three of

his surviving children and to the children of the other who was living and of the one who was dead, Lord Chancellor King decided that the grandchildren of the testator were entitled to take equally with the three children *per capita*, especially *as the parent of some of the grandchildren was living.* See also *Northey* v. *Strange*, 1 P. Wms. 143; *Butler* v. *Stratton*, 3 Bro. C. C. 367; *Wicker* v. *Mitford*, Harg. Law Tracts, 513."

In *Seabury* v. *Brewer*, 53 Barb. (N. Y.) 662, the testator by his will said:

"I wish my personal and real estate to be appropriated equally to the benefit of my wife Emily and of my children, Seabury and Florence."

The court said:

"We regard the law as too well settled to admit of a reasonable doubt in regard to the construction which this provision of said will should receive in determining the rights of the respective parties in a division of said estate. It is very clear that the parties named should take *per capita* and not *per stirpes*, and, therefore, each is entitled to one-third of the residue of the [illegible] er the dower interest of the widow is satisfied. [illegible] v. *Myres*, 23 How. Pr. Rep. 410, Justice Bo[illegible] well reasoned opinion, has fully and satisfacto[illegible]cussed this question. See also *Collins* v. *Hoxie*, [illegible]aige, 89; *Bunner* v. *Storm*, 1 Sandf. Ch. 358; *Murphy* v. *Harvey*, Edw. Ch. 131. There is not an expression contained in the will which is not in harmony with this construction or which indicates that the testator intended to make any other disposition of his property."

In *Myres* v. *Myres*, 23 How. Pr. Rep. 410, referred to in the preceding case, the direction as to the residue was that it was "to be equally divided *between* my son Thomas M. Myres, and the heirs of my son Melancthon W. Myres,"

and it was held after a full discussion of the authorities that the distribution must be *per capita* and not *per stirpes*, there being nothing in any other portion of the will suggesting any different understanding than must be given to it in a separate reading. The court in this case speaks of the significance of the word "between," as used in this will, as will hereinafter appear.

In re Verplanck, 91 N. Y. 439, the residuary clause of the will was:

"All the rest, residue and remainder of my personal property, I give and bequeath to my said nephews and nieces, the sons and daughters of my brother, John Henry, and my sister Elizabeth, to be divided equally *between* them. In case of the death of any such nephew or niece before me, what would have been his or her share, if living, I give to his or her issue, if any, equally. If there be none, then to the survivors of my last aforesaid nephews and nieces, and the issue of those deceased, *per stirpes* and not *per capita*."

The court said:

"Looking at the language of the residuary clause alone, according to every authority which has fallen under our observation, we would have to hold that the nephews and nieces take *per capita*. 2 Jarman on Wills, Randolph & Talcot's Edition, 75; *Ferrer* v. *Pyne*, 81 N. Y. 281; *Vincent* v. *Newhouse*, 83 N. Y. 505; *Hoxton* v. *Griffith*, 18 Gratt. 574; *Balcom* v. *Haynes*, 14 Allen, 204; *Risk's Appeal*, 52 Pa. St. 269; *Bivens* v. *Phifer*, 2 Jones Law, 436; *Lockhart* v. *Lockhart*, 3 Jones Eq. 205. In this case *the legatees are all of equal degree of relationship to the testatrix, and it is not to be supposed that she had any greater affection for, or interest in, one than in another.* So far as appears, *they all had equal claims upon her bounty and liberality. There is no natural or reasonable presumption that she intended to give one of her nephews and nieces, thus situated, any more than another. There is no reason*

to suppose that she meant to give one of the children of her brother more than four times as much as she intended to give one of the children of her sister."

See also *Lee* v. *Lee*, 39 Barb. 172; *Bisson* v *West Shore R.R. Co.*, 143 N. Y. 125.

NORTH CAROLINA.

In *Ward* v. *Stow* (1834), 2 Dev. Eq. (N. C.) 509, the direction of the will was that—

"all the remaining part of my estate, both real and personal, be equally divided amongst the heirs of my brother John, the heirs of my sister Nancy Stow, and the heirs of my sister Sallie Ward and my nephew Levi Ward."

At the death of the testator, his brother John and his sister Nancy were living; the former having four and the latter nine children. Sallie Ward was dead at the date of the will, having left two children, both of whom survived the testator, and of whom Levi Ward, the plaintiff and legatee, was one. The court said:

"The will declares that the property given to these persons shall be equally divided, and the one question that remains is between whom is this equality directed. Is it between the classes, or is it between the individuals of whom the classes are composed? Adopting the language of Chief Justice Taylor in 3 Hawks. 604, we think that there 'has been a settled construction upon all devises and bequests of this description recorded in a series of decisions to be traced back for more than a century,' which leaves us no liberty to speculate on this question. It can scarcely be necessary to swell the list of authorities to which he has appealed and which clearly sustains his position. We will add only the following cases to the very strong ones which he has enumerated."

The court then referred to a number of authorities and concluded that the distribution must be *per capita* and not *per stirpes.*

In *Waller* v. *Forsythe*, 1 Phill. Eq. (N. C.) 353, the bequest after a life estate was—

"to be equally divided *between* the children of said Nancy Waller (the life tenant) and my sons William and John."

Held that—

"the division must be *per capita.* Each of the children of Nancy take a share equal to the shares of John and William."

In *Johnston* v. *Knight*, 117 N. C. 122, the will provided

"and the balance of my estate, both real and personal, be equally divided *between* William T. Knight, Pattie McDowell and the children of J. P. and Margaret L. Sugg, and the children of Elisha McDowell."

Held that the distribution should be *per capita* and not *per stirpes*, the court saying:

"This has been the rule since *Ward* v. *Stow*, 2 Dev. Eq. 509, down to the present time, with numerous intervening decisions. The words 'equally divided' do not absolutely control in all instances, but yield only when other language of the will or the manifest intent requires it. The argument based on the justice and natural affection does not change the rule. That would disturb other parts of the will. Testators usually divert the line of distribution from that marked out by the law for descent and distribution and no doubt do so in the light of the surrounding circumstances."

See also the following other North Carolina cases applying or recognizing the same rule of construction:

Bryant v. *Scott* heretofore cited; *Cheeves* v. *Bell*, 1 Jones Eq. 234; *Lane* v. *Lane*, 1 Wins. 630; *Roper* v. *Roper*, 5 Jones Eq. 16; *Howell* v. *Tyler*, 91 N. C. 207.

SOUTH CAROLINA.

In *ex parte Leith*, 1 Hill. Ch. (S. C.) 151, the devise was:

"All the residue and remainder of my real and personal estate, wheresoever situated, to be equally divided in the following proportions, that is to say, two shares to my deceased sons' (William and James) children, to be equally divided among them."

Held that all of the children of William and James took equally *per capita*, the court saying:

"If the clause of the will out of which this question arises, be interpreted according to the natural import of the terms used, there would seem to be no doubt that they must operate as a devise or bequest of the testator's estate, to be divided between the children of his deceased sons, William and James, *per capita* and not *per stirpes*. They are described as one and not several classes. It is like the case of *Butler* v. *Stratton*, 3 Bro. Ch. Ca. 367, where it was held, that under a bequest to the descendants of two persons, all their descendants, as well grandchildren as children, take *per capita*."

See also the following additional South Carolina cases: *Campbell* v. *Wiggins*, Rice Ch. 10; *Allen* v. *Allen*, 13 S. C. 512; *Perdriau* v. *Wells*, 5 Rich. Eq. 20; *Wessenger* v. *Hunt*, 9 Rich. Eq. 459; *Dupont* v. *Hutchinson*, 10 Rich. Eq. 1.

TENNESSEE.

In *Seay* v. *Winston*, 7 Humph. (Tenn.) 472, the devise was of property, after the death of the testator's wife, to be equally divided *between* the children of the testator's brothers and of his sister. The court said:

"We do not think there is any serious difficulty in holding that the devise is to the nephews and nieces individually and not in classes, and that they, therefore, take *per capita* and not *per stirpes*, each individual being entitled to one equal portion of the bequest. We do not see that argument can make it plainer than the words of the bequest. * * *. Now, it is not his brother and sister that are the objects of his bounty, but his nephews and nieces, each of whom is equally near in blood to him and no doubt equally beloved by him; then there could have been no motive or wish to divide them in classes, whereby the division of the bequests might, and no doubt would, have been most unequally made and in which he expressly provides against."

See also *Kimbro* v. *Johnston*, 15 Lea (Tenn.), 78, where the bequest was of property—

"to be divided equally *between* A. E. Ford, Sally Taylor, Eleanor Malloy, Mary's daughters, James' daughters; my personal property to be divided *between* Ada Raines and A. E. Ford."

The court in determining that the distribution should be *per capita*, said:

"The will itself shows a selection by the testatrix of the objects of her bounty out of persons standing in the same relation to her with others of the same *stirps*. There is nothing, either in the will or the circumstances, to take the case out of the general rule."

See also *Puryear* v. *Edmondson*, 4 Heisk. (Tenn.) 43; *Ingram* v. *Smith*, 1 Head (Tenn.), 411; *Rogers* v. *Rogers*, 2 Head (Tenn.), 660.

EFFECT OF MARYLAND ADJUDICATIONS.

While it may be conceded that decisions of the Maryland courts, rendered since the cession of the District by that State, are not in general binding on the courts of the District of Columbia, it is suggested that such decisions are always very persuasive, and should be followed unless manifestly wrong. This is especially true where rules of property or rules for the effect and construction of wills, are involved. And in some instances they are to be regarded as binding in our courts.

In *De Vaughn* v. *Hutchinson*, 165 U. S. 566, it was held by this court that the rule in *Shelley's case* was applicable to a will devising real estate in this District, and the court applied the principle that it must look to the law of the State in which land is situated for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. After noting that the land in controversy formed part of the soil of Maryland before the cession, this court said:

"We learn from the reported cases that the rule [in Shelley's case] as established in the jurisprudence of England before the American Revolution, was introduced into Maryland as part of the common law and has been consistently recognized and enforced by the courts of that State."

The court then cited a number of Maryland cases, beginning with one in 4 H. & J. (which is the very same volume of reports that contains the decision of the Mary-

land Court of Appeals in *Maddox* v. *The State*, upon which the Court of Appeals of this District largely relied in the determination of the case at bar), and concluding with a case in 60 Md.

Referring to these decisions, in another part of its opinion this court said:

"Though these decisions were made since the lands in question in this case became part of the District of Columbia, yet their reasoning is based upon the history of the law in Maryland ever since that State became independent, and we are, therefore, warranted in the conclusion that the law as laid down in the cited cases was the law when the State of Maryland ceded to the United States the territory now embraced in the city of Washington and District of Columbia. It is not claimed that there has been any legislation by the Congress of the United States which has modified or changed the law in this particular as it was when the lands in question were subject to the law of Maryland. Nor do we find that there has been any attempt by the courts of the District to lay down a different rule."

This language is particularly applicable to the case at bar, inasmuch as we have involved here a rule for the construction of wills which has been consistently followed in the State of Maryland from an early date in the history of the State, and would seem to show that the Maryland adjudications cited are not only to be regarded as persuasive but as binding on the courts of this District.

A fortiori, as compared with *De Vaughn* v. *Hutchinson*, we do find the courts in this District passing upon this rule of construction of wills, and we find our courts following the Maryland rule. See *Moffit* v. *Varden*, 5 Cranch, 68, and *Follansbee* v. *Follansbee*, 7 App. D. C. 282, heretofore cited.

In *De Vaughn* v. *Hutchinson*, this court also referred

to the fact that the opinion of the lower court was delivered by a judge who had been recently the chief justice of the Court of Appeals of Maryland. Similarly in this case, a judge (Chief Justice Alvey), who sat with the court in the determination of the case at bar, sat with the Court of Appeals of Maryland in the determination of *Brittain* v. *Carson, supra*, which is also relied upon by the lower court in the decision of this case.

Here we have at least two Maryland cases, namely, *Maddox* v. *The State* and *Brittain* v. *Carson*, on all fours with the case at bar, absolutely undistinguishable from it, so far as the language of the respective wills is concerned; and we respectfully submit that the Court of Appeals of this District was right in relying upon them as precedents and following the rulings made in them.

Significance of the Use of the Word "Between" in the Residuary Clause.

Counsel for Charles McIntire in his brief (page 9), contends that "the word *between*, without something to qualify its ordinary meaning, must be taken in its proper sense as indicating a division between two and not among six," and three cases, two in Pennsylvania and one in Missouri, are cited in support of such contention.

In sixteen of the cases cited in this brief, wills are construed in which testators have used the word "*between*" in referring to more than two legatees; and in one case (*Purnell* v. *Culbertson*, 12 Bush. (Ky.) 369, the learned judge who delivered the opinion of the court was himself guilty of this etymological lapse, if it be such. Nothing could better demonstrate, we submit, that the word "*between*" is colloquially and commonly used as synonymous with "*among*."

Judicial authorities are not lacking upon this subject

which differ radically from those cited by the opposing counsel. Thus in *Myres* v. *Myres*, 23 How. Pr. (N. Y. Supreme Court), 410, heretofore cited in this brief, it is said:

"It is suggested that the word '*between*,' as used in this will, has a different signification from the word '*among*"; that it carries an idea of a division into two parts, whereas '*among*' imports a division into many parts. I find, however, that '*between*' is often used as synonymous with '*among*,' especially when employed to convey the idea of division or separate ownership of property held in common. It is quite as appropriate to say that property is to be divided '*between*' A, B and C, as '*among*' A, B and C. So Webster says: 'We observe that "*between*" is not restricted to two'; and he illustrates thus: 'Twenty proprietors own a tract of land "*between*" them.' This word was used in several of the cases cited, yet it was not regarded as at all influential on the question of construction."

So in *Lord* v. *Moore*, 20 Conn. 122, the testator leaving a wife and four children gave the income of the residue of his estate to be equally divided "*between*" his wife and children, and it was *held* that the wife took a share of the income equal only to that of one of the children.

And so in *Farmer* v. *Kimball*, 46 N. H. 435, the court construing a residuary clause in which the word "*between*" was used with reference to several legatees, said:

"This construction is not controlled by the use of the word '*between*.' *Abrey* v. *Newman*, 17 L. and Eq. 126; *Lenden* v. *Blackmeer*, 10 Simons, 626; *Warrington* v. *Warrington*, 2 Hare, 54; *Williams* v. *Yates*, 1 C. P. Cooper, 177."

EFFECT OR ADMISSIBILITY OF EXTRANEOUS FACTS.

There is absolutely nothing in the context of the will indicating, however faintly, that it was the testator's intention to divide his nephews and nieces into two classes,

for the residuary clause is preceded only by a provision making a pecuniary bequest to each of his brother Edwin's children.

But it is urged in the brief of appellant that a certain extraneous fact is admissible as evidence, and that, if admitted, it will make clear that the testator's intention was that appellant was to receive one-half of this estate and his five cousins only the other half. This extraneous fact is that the testator's brother Charles, appellant's father, owed the testator $1,350.64, and had owed it to him since 1854, long before the will was made. And from this the conclusion is drawn on behalf of the appellant (page 8 of his brief) that the testator "sought to equalize the family of his two brothers by giving to the children of his brother Edwin the amount of his brother Charles' indebtedness, with interest from the year of its creation down to the date of the testator's death," and that "having in this mode given to the children of his deceased brother Edwin a sum equal to the *advancement* [sic] to his brother Charles, with interest, he then provides for the equal division of the *residuum* of his estate, and that *residuum* of his estate, when and after being thus equally divided, is to go to the two sets of children, those of his brother Edwin and those of his brother Charles."

This certainly seems to be traveling far into the realms of conjecture, and affords an illustration of the danger of admitting extraneous evidence under the circumstances surrounding this case, to show the intent of a testator.

We submit that such evidence is inadmissible. See *Weatherhead's Lessee* v. *Baskerville*, 11 How., p. 357; *Wilkins* v. *Allen*, 18 How. 385; *Mackie* v. *Stone*, 93 U. S. 583; *Kaiser* v. *Brandenburg*, 16 App. D. C. 16, and cases cited; *Bunner* v. *Storm*, 1 Sandf. Ch. 357; *Myres* v. *Myres*, 23 How. Pr. (N. Y.) 410; 1 Jar. on Wills (5th Ed.), pp. 509 *et seq.*

And the language of the court in *Bradford* v. *Bradford*, 6 Wharton, 244, is very appropriate here:

"The court must proceed on known principles and established rules, not on loose conjectural interpretations nor considering what a man may be imagined to do in the testator's circumstances."

But admitting, for the sake of argument, that this extraneous fact may be considered by the court, it is difficult to see how it supports the contention of the appellant. Edwin's children were *not* left a sum merely equal to the alleged indebtedness of Charles, but every one of Edwin's children was given that sum, making a total bequest to all of Edwin's children living at the date of the will of over $7,000 exclusive of interest. The contention was made below by the appellant and decided adversely to him, that the meaning of the will was that *all* of the children of Edwin together were to receive only $1,350.64 with interest. The Court of Appeals said on this subject (Record, p. 75):

"In construing the clause of the will giving to the children of the testator's brother Edwin the sum of $1,350.64 with interest accumulated at 6 per cent. per annum from July 1, 1854, to the date of the testator's death, the court was clearly right. The terms of the will are plain and admit of no doubt. The bequest is to *each* of them and is a first charge on the fund."

The appellant has abandoned his contention on that point, as will be observed by his assignments of error here.

Again, what he refers to in his brief as an "*advancement*" by the testator to his brother Charles, was not such, but was a debt evidenced by promissory notes (56) which had been due from Charles to the testator since 1854,

none of which had been paid, which was not forgiven by the terms of the will, and which became one of the assets of the estate on the death of the testator. It would be a very reasonable surmise that this unpaid indebtedness was one of the causes which led the testator to ignore his brother Charles in the final distribution of his estate.

(See the opinion of this court in the will case, 162 U. S. 383.)

And so it would seem to us, that this long unpaid debt of Charles, Sr., to the testator, so far from being an argument in favor of an intention to create two very unequal classes among nephews and nieces, rather brings the case within the reasoning of *Blackler* v. *Webb*, 2 P. Wms. 183, where the husband of one of testator's living children being in bad financial circumstances, the testator, instead of giving that daughter a share in his estate made a bequest directly to her children; and to indicate that it was the intention of David McIntire by his will, ignoring as he did his living brother and legal next of kin and the statute of distributions, to distribute his estate equally to his several nieces and nephews, all of whom were of an equal degree of kinship to him.

Reduced to its last analysis, the contention of Charles, Jr., would seem to be that, notwithstanding the plain and unambiguous language of the residuary clause of his uncle's will (which provides for an *equal* division of the *residuum* of his estate between his "brothers Edwin and Charles' children," which can only mean the same as saying in different words, his nephews and nieces), the testator meant to distribute such *residuum*, not equally between them, but unequally; that is to say, to give his brother Charles' two children one-fourth each and his brother Edwin's six children only one-twelfth

each, because, forsooth, in a previous part of the will he had given each of his brother Edwin's children a pecuniary legacy, while he had given Charles' children nothing. In other words, the court is asked not to construe this will, but to re-make it, giving to one of the legatees more than the testator plainly intended him to have, because of a supposed injustice on the part of the testator toward such legatee in the final distribution of his estate, which was, in fact no injustice at all for that legatee was not of his legal next of kin, his father, the testator's brother, being still alive.

That Edwin's children were the favorite nephews and nieces of the testator, having greater claims, as he thought on his bounty than the others, is apparent from the fact that in the first part of the will he gave them a sum of money which could only be determined by a calculation of interest from 1854, and then in the residuary clause provided for a distribution of the remainder of his estate, "*if any*" there might be.

PART II.

Third and Fourth Assignments of Error.

These assignments are directed to the action of the courts below in allowing counsel fees amounting to $11,500.00, paid to Mr. Henkle and Mr. Totten, who in turn defended this will in the attack made upon its validity by Charles McIntire, Sr., to be charged against the estate instead of charging such fees against the individual shares of Edwin McIntire's children. In other words, the appellant complains that he should not be compelled to bear one-sixth of these counsel fees, or about $2,000.

The litigation over this estate, commenced by Charles McIntire, Sr., and continued by his son, Charles McIntire,

Jr., both as his father's administrator and in his individual capacity as a legatee, dates back to June 5, 1885, when Charles McIntire, Sr., the brother of the testator, filed a petition for revocation of the probate of the will, alleging the exercise of undue influence on the testator, want of testamentary capacity, etc.; and from that time to the present, almost twenty years, he, and after his death, his son, the appellant, have sought incessantly to thwart the testamentary intentions of the deceased. It was absolutely essential that competent counsel should defend the will against the distinguished counsel on the other side, and Mr. Henkle, and after his death Mr. Totten, were employed, and no question has ever been made of the reasonableness of their charges for professional services. The first order of the court allowing counsel fees was dated March 5, 1886, and allowed Mr. Henkle $500 "to be charged to the distributive shares of" Edwin T. McIntire's children (15). This item will not be dealt with in this brief, as the Court of Appeals directed that it should not be allowed against the estate. The subsequent orders of the court allowing counsel fees were dated July 22, 1893, July 12, 1895, January 28, 1896, and June 1, 1896 (16–26). During all this time the assets of the estate were not in the control of the administrator *c. t. a.*, but were in the custody of Mr. Henkle or Mr. Totten, and of Mr. Carlisle, as "custodians," the latter being of counsel for the caveator. This explains why the administrator *c. t. a.* did not himself pay the counsel fees, and is perhaps an explanation of the provisional character of the orders allowing them. The orders provided that the several sums paid counsel should be charged against the shares of Edwin McIntire's children, without prejudice, however, to their right or to the right of the administrator *c. t. a.* to apply to the court, at the termination of the litiga-

tion touching the validity of the will, to have said allowances charged against the estate of the said testator. It will be observed that the requirement was not that the application should necessarily be in writing, but that the orders simply contemplated the question being raised at the proper time in the future by some sort of application, oral or written, as to whether the fees should be charged against the estate. When the assets of the estate were finally turned over to the administrator *c. t. a.* the fees had actually been paid out of the assets, and the question whether they should be finally charged against the estate was necessarily raised when he filed his account. It is an error to say, as in appellant's brief (page 24), that there was "no opportunity to any person in interest to be heard with respect" to these counsel fees. On the contrary, as stated by the Court of Appeals (Record, pp. 72, 73), "opportunity was given to present exceptions to the account, on that ground as well as others." The Court of Appeals, therefore, very properly regarded the final order approving the account and ordering distribution as amending or superseding the former orders of the court charging the interests of the several children of Edwin T. McIntire with the payment of these fees.

There were no technicalities of procedure in the old orphans' court. They have been rebuked when attempted there (Hignutt *v.* Cranor, 62 Md. 216; Munnikhuysen *v.* Magraw, 57 Md. 172). We submit that the presentation and auditing of the administrator's final account, in which the shares of Edwin T. McIntire's children were *not* charged with any part of the counsel fees, was a sufficient application to the court within the meaning of these several provisional orders, for the reason that ample opportunity was thereby given the vigilant appellant, which opportunity he most assuredly availed him-

self of, to present his reasons why the fees should not be charged against the estate. Having had this opportunity, and now conceding, as he practically does, that the administrator *c. t. a.* stands in the same position as an executor as to the right to employ counsel to defend the will, it is respectfully submitted that his objections are of such a technical character and so untenable as to require little or no consideration by the court.

But for the action of the appellant and his father, this estate would have been distributed nearly twenty years ago, and it would not be unjust if the caveatees were relieved entirely of the payment of counsel fees, made necessary by the attack on the will, and the caveators were made to bear the whole of that burden. But that has not been done, and the effect of the action of the court below is merely to require Charles McIntire, Jr., to bear only one-sixth of the burden. Manifestly, he has no reasonable ground to complain of such action.

We respectfully submit that the appeal of Charles McIntire, Jr., is without merit, and that the decision of the Court of Appeals, in so far as it overruled his exceptions and objections to the final account, should be affirmed with costs.

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